In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA,
Appellants,

vs.

ORRIN W. FOX Co., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court, Central District of California

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Appellants appeal from the summary judgment of a three judge court of the United States District Court, Central District of California entered on September 15, 1977. The judgment appealed from permanently enjoined the New Motor Vehicle Dealer Board of the State of California ("Board") and other officials of the State of California from performing their duties as prescribed by certain provisions of the

California Automobile Franchise Act (California Vehicle Code §§3060-3069) ("Act"), on the ground that certain provisions of the Act violate the Due Process Clause of the Fourteenth Amendment. Appellants were made defendants in intervention in the action by uncontested order of the district court, and will hereafter usually be referred to as "intervenors". The Board and other California state officials enjoined by the district court are also appealing the district court judgment to this Court in action No. 77-837 entitled *New Motor Vehicle Board of the State of California, et al. v. Orrin W. Fox Co., et al.* Action No. 77-837 has been consolidated with the instant appeal by order of this Court on February 21, 1978.

OPINION BELOW

Unofficial reports of the opinion of the court below appeared at 834 Antitrust & Trade Regulation Report, page D-1 (October 13, 1977) and 46 United States Law Week 2188 (October 18, 1977), and the opinion was reported in full as *Orrin W. Fox Co. v. New Motor Veh. Bd., etc.,* 440 F.Supp. 436 (C.D. Cal. 1977).

JURISDICTION

This action was brought to enjoin the enforcement by California state officials of the California Act, on the grounds that the statute is unconstitutional. It was filed on April 13, 1976, while §2281 of Title 28

of the United States Code was fully effective. Under the terms of §2281 this action was required to be, and was, heard and determined by a district court of three judges pursuant to 28 U.S.C. §2284. The right of appeal to this Court from an injunction in a civil action required to be heard by a three judge district court is established by 28 U.S.C. §1253. Decisions which sustain the Court's jurisdiction in cases of this type include: *Hicks v. Miranda,* 422 U.S. 332, 342-343, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) and *United States v. Georgia Public Service Commission,* 371 U.S. 285, 287-288, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963). A Jurisdictional Statement was timely filed by intervenors, and probable jurisdiction noted by this Court on February 21, 1978.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves Article I, section 8, clause 1 and Article VI, clause 2 of the United States Constitution, and Amendment XIV, section 1 to the United States Constitution. The California statutes involved are California Vehicle Code §§507, 3060-3063, 3066-3069 and 11713.2(l). These provisions are set forth in the Appendix following this brief.

QUESTIONS PRESENTED

1. Is the expectation of establishing or relocating a retail automobile franchise a liberty or property interest which is protected by the procedural guaran-

tees of the Due Process Clause of the Fourteenth Amendment?

2. Assuming that the procedural guarantees of the Due Process Clause protect the expectation of establishing or relocating a retail automobile franchise, do those procedural guarantees require the State of California to provide an evidentiary hearing to persons holding that expectation prior to issuing an order which may delay the establishment or relocation of the franchise for a period of up to ninety days pending the outcome of an evidentiary hearing on the issue of whether there is good cause for permanently prohibiting the establishment or relocation of the franchise?

3. Should the district court judgment be affirmed on the basis of an argument, unconsidered by, but advanced before the district court that the terms of the Act conflict with the federal antitrust laws and are therefore invalid under the Supremacy Clause of the United States Constitution?

STATEMENT OF THE CASE

The Board was created by California statute in 1967 and given responsibility for the licensing of new automobile retail dealers in that state. The Board was also given the statutory power to review decisions of the Department of Motor Vehicles of the State of California ("Department") imposing discipline upon licensed new car dealers, the power to investigate public complaints concerning any licensed dealer and

the power to undertake to arbitrate any dealer-customer dispute or to recommend disciplinary action to the Department regarding the dealer involved. The Board, as created, consisted of nine members, four of whom had to be new car dealers, licensed as such for not less than five years.

In 1973, the duties and responsibilities of the Board were substantially broadened by the passage of the Act. The Board was now given the additional power to review disciplinary decisions of the Department regarding the California license of any automobile manufacturer, distributor, or manufacturer's representative, and to receive and arbitrate or recommend Department action on any public complaints concerning any automobile manufacturer, distributor or manufacturer's representative.

The 1973 Act also established certain adjudicatory functions for the Board as part of a rather detailed legislative scheme for regulating certain aspects of the relationship between automobile manufacturers and their California retail dealers. The Act prohibits any automobile manufacturer (hereafter sometimes "franchisor") from terminating any franchise which it has with a California automobile dealer (hereafter sometimes "franchisee") without first giving advance notice to the franchisee and to the Board, and the Act also requires franchisors to provide reasonable compensation to any dealer-franchisee as reimbursement for automobile delivery and preparation expenses and for manufacturer warranty servicing expenses incurred by a franchisee in connection with selling and

servicing the franchisor's automobiles. (California Vehicle Code §§3060, 3064 and 3065) If the affected franchisee protests the termination of its franchise to the Board there can be no termination unless the Board finds that good cause exists for the termination in an evidentiary hearing. (California Vehicle Code §§3060, 3061, 3066-3069)[1] Similarly, upon protest by franchisee, the Board is given the power and duty to determine whether a franchisor has paid reasonable compensation to reimburse the protesting franchisee for delivery and preparation expense or for expense of warranty servicing. (California Vehicle Code §§3064-3069)

Another related feature of the 1973 Act triggered the litigation at bar. Vehicle Code §3062 provides that an automobile manufacturer may not establish a new franchisee or relocate an old franchisee without first giving written notice of such intention to the Board and to each of its existing franchisees for the same

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[1]Federal legislation directed at protecting new car dealers from abusive and oppressive acts of automobile manufacturers, including bad faith franchise termination, was enacted by Congress in 1956 with the passage of the Automobile Dealers' Day in Court Act (15 United States Code §§1221-1225). Perhaps partly because the Dealers' Day in Court Act contains language which is tantamount to an invitation to states to legislate on the subject of automobile manufacturer-dealer relationships (see 15 U.S.C. §1225), thirty-eight states and the Commonwealth of Puerto Rico have statutes which afford protection to dealers from abusive or coercive acts of automobile manufacturers, generally including specific prohibition of arbitrary manufacturer terminations of franchisees without good cause, e.g., Florida Statutes §§320.64(8) and 320.641; New York General Business Law §197; 63 Pennsylvania Statutes §805(2)(xi) and Texas Civil Statutes, art. 4413(3), §5.02(3).

"line-make" of automobile located within the "relevant market area". Such area is defined in Vehicle Code §507 as ". . . any area within a radius of 10 miles from the site of . . . [the] . . . potential new dealership." If any of the existing franchisees within the market area protest to the Board within 15 days of receiving such notice, the Board must issue an order temporarily prohibiting the franchisor from establishing or relocating the proposed dealership until the board has held a hearing to determine if there is good cause for refusing to permit the proposed dealership to be established. If the Board, at such hearing, determines that good cause exists for *not* permitting the proposed dealership, the franchisor may not do so.[2] The protesting franchisee has the burden of proving that good cause exists for not permitting the franchise to be established at the Board's hearing which must be held within 60 days of the Board's order temporarily prohibiting the franchisor from establishing or relocat-

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[2]At least seventeen other states have legislative provisions similar to those in the Act, establishing certain conditions, or requiring a determination by a state board or official, before a manufacturer can establish a new dealer-franchisee within the relevant marketing area of an existing dealer-franchisee who sells the same line-make of the manufacturer's automobiles. As noted in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, ... U.S. ....., 98 S.Ct. 359, 363 (footnote 4), ... L.Ed.2d ..... (1978), these statutes include: Ariz.Rev.Stat. §28-1304.02; Colo.Rev.Stat. §13-11-20; Fla.Stat. §320.642; Ga.Code §84-6610(f)(8)(10); Hawaii Rev. Stat. §437-28(a),(b)(22); Iowa Code Ann. §322A.4; Mass.Stat. Ann. ch. 93B, §4(3)(1); Neb.Rev.Stat. §60-1422; N.H.Rev.Stat. Ann. §§357-B:4 (III)(1); N.M.Stat.Ann. ch. 64; N.C.Gen.Stat. §20-305(5); R.I. §31-51-4(C)(11); S.D.Laws §§32-6A-3, 32-6A-4; Tenn.CodeAnn. ch. 17, §59-1714(j); Vt.Stat.Ann. Tit. 9, ch. 107, §4074(c)(9); Va.CodeAnn. §46-1-547(d); Wis.Stat.Ann. §218.01 (3)(8); W.Va.Code vol. 14, §47-17-5(i).

ing the proposed franchise. (California Vehicle Code §3066)[3] Within 30 days after the hearing (or the receipt of a proposed decision from a hearing officer if such an officer is designated by the Board to hold the hearing), the Board must render its decision, or else the establishment of the proposed franchise is deemed approved. (California Vehicle Code §3068) It is unlawful for a franchisor to establish or relocate a franchise in violation of an order of the Board. (California Vehicle Code §11713.2(l))

Appellees herein filed suit on April 13, 1976 in the United States District Court, Central District of California, seeking a three judge court determination that the Act was unconstitutional and that its enforcement should be enjoined. (A. 1-26) Appellee Orrin W. Fox Co. ("Fox") claimed to have executed a General Motors Corporation ("GM") franchise agreement in May, 1975, with appellee GM under which Fox was to

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[3]In any hearing conducted by the Board following a dealer protest under Vehicle Code §3062, all new car dealer members of the Board are prohibited by Vehicle Code §3066(d) from participating in any way. The prohibition in Vehicle Code §3066(d) against dealer Board member participation also applies to hearings held under the three other sections of the Act which establish a requirement of a Board hearing upon a dealer protest, to wit: §3060 (protest of franchise termination), §3064 (protest of failure of manufacturer to provide for reasonable reimbursement to dealer for car delivery and preparation expense) and §3065 (protest of failure of manufacturer to provide for reasonable compensation to dealer for manufacturer warranty servicing expense). Vehicle Code §3066(d) was added to the Act by the California Legislature following *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 C.A.3d 983, 138 Cal.Rptr. 594 (Cal. Ct. of Appeal 1977), in which participation by dealer members in Board protest hearings was held unconstitutional.

be a newly established Buick dealer in Pasadena, California. Appellee Muller Chevrolet ("Muller") claimed to have made arrangements for a transfer of his existing GM Chevrolet franchise from Glendale to La Canada, California in December, 1975. The proposed establishment of both the Fox and Muller franchises were protested by the existing Buick and Chevrolet dealers, respectively, in the two relevant market areas in timely fashion under Vehicle Code §3062. The Board responded with orders prohibiting the establishment of the proposed franchises until it could hold hearings under Vehicle Code §3066. For various reasons neither protest proceeded to a Board hearing prior to the filing of the within action by the three appellees.

In their Motion for Partial Summary Judgment, appellees claimed that the Act violated their procedural due process rights under the Due Process Clause of the Fourteenth Amendment and was also invalid under the Supremacy Clause because it was in inherent conflict with the federal antitrust laws. (A. 104-136) The three judge district court specifically addressed only the first of appellees' arguments in granting a Summary Judgment holding the entire California Automobile Franchise Act unconstitutional on its face. (Intervenors' Jurisdictional Statement, Appendix pages xi-xiii) The district court enjoined the enforcement of the Act on the sole ground that, in the court's opinion, the Act deprived appellees of their due process protected rights to hearings prior to the deprivation of their liberty and property interests in

establishing new, or relocating existing, automobile dealerships.[4]

The Summary Judgment granted by the district court also stated an alternative ground for holding the Act unconstitutional on its face even though this alternative ground was unmentioned in its Memorandum of Decision. The alternative ground so stated is that the Act fails to provide for a prompt hearing on the merits following the initial temporary deprival of appellees' liberty and property interest in establishing a new or relocated dealership. This "alternative ground" is directly contradicted by the terms of the Act, which provides that the Board must hold a hearing within 60 days following the issuance of a temporary order (California Vehicle Code §3066) and that the Board must render its decision within 30 days after the hearing (California Vehicle Code §3068). In appellees' Motion to Affirm, they apparently have chosen to abandon the "alternative ground", because the Motion makes no reference to it.

On December 6, 1977, upon application by appellant Board, this Court issued a stay of the district court judgment, Justice Rehnquist, writing. *(New Motor Vehicle Board of Cal. v. Orrin W. Fox Co.,* ..... U.S.

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[4]While the district court ruled that the entire California Automobile Franchise Act (Vehicle Code §§3060-3069) was unconstitutional, only Vehicle Code §§3062 and 3063 and the references to §3062 contained in Vehicle Code §3066 were involved in the litigation before the district court. Thus the other provisions of the Act would appear to have been gratuitously voided even though they do not involve the asserted Constitutional infirmity which the district court found in §§3062 and 3063 and the references to §3062 in §3066.

....., 98 S.Ct. 359, ... Law Ed.2d ..... 1977). The Stay Order contains a lucid, and thoroughly convincing, review of past decisions of this Court which establish that, at least in the opinion of Justice Rehnquist, the appellants possess neither a "liberty" nor "property" interest within the meaning of the Fourteenth Amendment to the United States Constitution.

Automobile manufacturers have challenged the validity of a number of state statutes which are similar in effect to California Vehicle Code §3062. In *General GMC Trucks, Inc. v. General Motors Corp.*, 329 Ga. 373, 237 S.E.2d 194, *cert. denied,* ..... U.S. ....., 98 S.Ct. 634, 54 L.Ed.2d 491 (1977), the Georgia Supreme Court held a similar Georgia statutory provision (Georgia Code Annotated §84-6610(f)(10)) to be unconstitutional as an undue burden on interstate commerce. Earlier this year the United States District Court for the Eastern District of Virginia held a similar Virginia statutory provision (Code of Virginia §46.1-548(d)) to likewise be an unconstitutional burden on interstate commerce. *(American Motors Sales Corporation v. Division of Motor Vehicles of the Commonwealth of Virginia,* ..... F.Supp. ..... (E.D. Va. 1978), see 854 Antitrust and Trade Regulation Report, page F-1 (March 9, 1978).) The American Motor Sales Corporation decision is, intervenors assume, pending before the Fifth Circuit Court of Appeals at this time. Both the Georgia and Virginia statutes were essentially similar to California Vehicle Code §3062 except that the statutes involved in those cases required that a hearing by a single official, rather

than a Board, be held upon a dealer protest to determine if a manufacturer could insert an additional franchisee in a market area already served by an existing franchisee. While appellees asserted that California Vehicle Code §3062 constitutes an undue burden on interstate commerce in their Complaint (A. 5, 22-23), they did not argue, or in any way advance, this proposition before the district court below when they moved for a summary judgment.

ARGUMENT

I. APPELLEES CLEARLY ARE NOT ASSERTING INDIVIDUAL INTERESTS WHICH QUALIFY AS "LIBERTY OR PROPERTY" UNDER THE FOURTEENTH AMENDMENT, THUS THE PROCEDURAL GUARANTEES OF THAT AMENDMENT ARE NOT APPLICABLE.

Appellees Fox and Muller each possess a desire to operate automobile dealerships, and to obtain future benefits from doing so, while appellee GM possesses a desire to franchise each of them to operate dealerships. Such business desires or expectation of future benefits are clearly not within the limited class of interests which this Court has stated are included within the phrase "liberty or property" in the Due Process Clause in the Fourteenth Amendment. The district court avoided any discussion of, or the making of any finding on, this point in its Memorandum of Decision ("Decision"). However, such a determination must be made under the "familiar two step analysis" which must be undertaken when the claim of a violation of the procedural due process rights of a citizen is made: first, a determination of whether the

asserted interest of the citizen is encompassed within the Fourteenth Amendment's protection of "life, liberty or property", and second, if protected interests are implicated, what procedures constitute "due process of law". *(Ingraham v. Wright,* 430 U.S. 651, 97 S.Ct. 1401, 1413, 53 L.Ed.2d 257 (1977))

In a considerable number of decisions in recent years, all unmentioned in the district court's Decision, this Court has clearly established that a mere expectancy of continued employment or a future contractual benefit is not entitled to procedural due process protection because such an expectancy is neither a property interest nor a liberty under the Amendment. Although appellees' asserted interest would appear to be more likely to be held to be "property" than a "liberty", the decisions of this Court clearly establish that they cannot be classified as the former. In *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1971) and *Perry v. Sinderman,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1971) this Court established that due process protects an interest in an intangible asset, such as a future contractual benefit or government benefit, as "property", only when a citizen's right to the benefit is established by a state's rules or by mutually explicit understandings with the state. (See 408 U.S. at 576-578 and 408 U.S. at 601-603). Assuming there is no allegation of the state having bound itself contractually to provide the expected future benefit, the requisite establishment can be supplied only by the laws of the state involved. *(Bishop v. Wood,* 426 U.S. 341, 344-347, 96 S.Ct. 2074, 48

L.Ed.2d 684 (1976)) There is no claim or allegation by appellees that their asserted interests in expected future contractual benefits is based upon any law of the State of California or any mutually explicit agreement with the State of California. Thus their expectations are not "property" for procedural due process purposes.

It is also clear that none of the expectations entertained by the appellees could qualify as a procedural due process protected "liberty". The cases mentioned above, as well as *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) make it plain that such liberties must be found either in the Bill of Rights, or have been recognized and protected by state law. No claim or assertion of such a source for the protection of appellees' expectations is made, and none can be.[5]

The points made here were better stated in Justice Rehnquist's Stay Order. (*New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., supra,* 98 S.Ct. at 361-363)

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[5]In appellees' Motion to Affirm, they make a gesture toward an argument that the right to locate an automobile franchise in any place a dealer desired was defined and protected by California law as a Fourteenth Amendment protected interest prior to passage of the Act. However, the authorities cited for this novel assertion are unconvincing. Appellees cite California Vehicle Code §11712(a), which merely imposes a *duty* upon a licensed automobile dealer to maintain a place of business and to notify the California Department of any change in location, and *Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd.*, 30 Cal.App.3d 494, 500-501, 106 Cal.Rptr. 340, 344 (1973), which merely recognizes the obvious principle that the holder of an *existing occupation license* is entitled to the procedural protection of the Due Process Clause before it may be revoked. Neither the statute nor the case deals with the right to establish a dealership whenever a dealer may choose, much less do they confer, establish or "protect" that "right."

As the Stay Order also points out, the *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) decision relied upon so heavily by the district court (Intervenors' Jurisdictional Statement, Appendix page viii) was an example of the economic "substantive due process" reasoning abandoned many years ago by this Court and is a less than compelling precedent for determining procedural due process issues fifty-five years after it was decided.

In that the Decision of the district court contains any analysis of the question of whether the appellees' expectations constitute either property or liberty under the Due Process Clause, it seems to implicitly adopt the position that the grievous losses which allegedly may be suffered by the appellees without an adjudication prior to a Board order delaying the establishment of a franchise require that due process procedural guarantees be afforded appellees. However, this Court has often stated that it is the nature of the interest asserted which must implicate the Due Process Clause, and not the harmful consequences or "grievous loss" allegedly occasioned by the failure to apply due process procedural guarantees. (*Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 97 S.Ct. 2094, 2108, ... L.Ed.2d ..... (1977); *Meachum v. Fano,* 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976); *Board of Regents v. Roth, supra,* 408 U.S. at 570-571, 92 S.Ct. at 2705)

The reasoning of the district court constitutes a complete departure from the analysis which this Court

has so clearly mandated for the resolution of procedural due process issues. The district court's Decision creates a new class of procedural due process protected interests—business desires and expected future contractual benefits. This new class of "protected" interests would expand the scope of application of the Fourteenth Amendment to an almost unimaginable degree.

Unless the Decision is reversed by this Court, the reasoning it contains and the determination it makes will jeopardize or negate thousands of state licensing and business regulation laws, including those state laws specifically dealing with the relationship between automobile manufacturers and dealers.[6]

II. THE PROCEDURE DETAILED IN THE CALIFORNIA AUTOMOBILE FRANCHISE ACT SATISFIES THE REQUIREMENTS FOR "THAT PROCESS WHICH IS DUE" EVEN IF THE INTERESTS ASSERTED BY THE APPELLEES WERE DESERVING OF PROCEDURAL DUE PROCESS PROTECTION.

The district court Decision does not mention the analysis established as mandatory by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 332-335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1975), and restated and applied in *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977) and by Justice Marshall in his concurring opinion in *Board of Curators of University of Mo. v. Horowitz*, ... U.S. ....., 98 S.Ct. 948, 958-961, ... L.Ed.2d ..... (1978). Assuming that the expec-

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[6]Note statutes on this subject mentioned in footnotes 1 and 2, *supra*.

tations of the appellees were "property" or "liberty" interests entitled to procedural due process protection, an application of the three-part *Mathews v. Eldridge* analysis would demonstrate that the Act meets the procedural requirements of the Due Process Clause. First, the private interest affected by the Board's temporary order is not vital and a temporary deprivation causes no grievous loss. Second, the existing procedure results in no risk of a permanent deprivation, since it is merely a postponement until a full evidentiary hearing and decision, which must be rendered within 90 days of the temporary order. Additional procedural safeguards would be meaningless because the only option would be to have a full hearing, requiring the time consuming assemblage of evidence relevant to the factors listed in Vehicle Code §3063. Any preliminary hearing would be a hurried and error prone affair and present no viable option to the existing procedure. Third, any type of preliminary hearing, given the complexity of the factors listed in Vehicle Code §3063, would be fiscally and adminstratively burdensome to the Board.

III. THE JUDGMENT OF THE TRIAL COURT SHOULD NOT BE AFFIRMED ON THE BASIS OF AN ARGUMENT, UNCONSIDERED BY THE DISTRICT COURT, THAT THE TERMS OF THE ACT CONFLICT WITH THE FEDERAL ANTITRUST LAWS AND ARE THEREFORE INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

A. This Court Need Not Consider, as an Alternative Ground for Affirming the District Court Judgment, the Argument That the Terms of the Act Conflict With the Federal Antitrust Laws and Are Therefore Invalid Under the Supremacy Clause of the United States Constitution.

Although the appellees argued to the district court that the Act, because it allegedly conflicts with the federal antitrust laws, should be declared invalid under the Supremacy Clause of the Constitution (A. 105, 128-135), the district court specifically refused to consider this claim in its decision. (*Orrin W. Fox Co. v. New Motor Veh. Bd., etc.,* 440 F.Supp. 436, 441 (CD Cal. 1977)) Since the district court did not reach this argument, now pressed by appellees in their Motion to Dismiss, appellants submit that it is within this Court's discretion to decline to consider that argument at this time. While it is true that this issue was briefed before the district court (see A. 105, 128-135), this Court is not able to review the thinking of the district court on this matter. For this reason, appellants submit that this Court should decline to exercise the discretionary right which it possesses to review alternative grounds for affirmance of a judgment. (Cf. *Langnes v. Green*, 282 U.S. 531, 535-539, 51 S.Ct. 214, 75 L.Ed. 520 (1931).) Accordingly the district court summary judgment should either stand

or fall on the basis of the arguments made above in this Brief.[7]

B. The Act and the Action of the Board Relevant to This Appeal Constitute "State Action", and in No Way Conflict With the Federal Antitrust Laws, Therefore the Act Cannot Be Held Invalid Under the Supremacy Clause of the Constitution.

As this Court has recently gone to some pains to establish, the "state action" exemption to the federal antitrust laws applies to the actions of state officials, even if "anticompetitive", as long as those actions are part of a clearly articulated and affirmatively expressed policy adopted by the state in its sovereign capacity in order to displace competition with regulation in a particular industry or business activity. (Cf. *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-363, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and *City of*

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[7]In their Motion to Dismiss, appellees state that they intend to argue before this Court that the Act is unconstitutional because it imposes an alleged "undue burden" on interstate commerce, and therefore conflicts with the Commerce Clause of the Constitution (Article I, section 8, clause 3). This argument was made by automobile manufacturers in the *General GMC Trucks, Inc. v. General Motors Corp., supra,* and *American Motors Sales Corporation v. Division of Motor Vehicles of the Commonwealth of Virginia, supra,* decisions discussed above. While an allegation was contained in appellees' Complaint to the effect that the Act constituted an undue burden on interstate commerce (A. 5, 22-23), appellees did not choose to present this issue to the district court in the motion for summary judgment. (A. 104-136) Because the district court never considered this argument, which appellees voluntarily elected to omit from their summary judgment motion, appellants submit that this Court should not consider any "undue burden on interstate commerce" argument in determining this appeal. Such action on the part of this Court would be consistent with its normal policy of not considering issues on appeal which were not presented to the lower court whose judgment is being subjected to review. (*Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967).)

Lafayette, et al. v. Louisiana Power & Light Co., 46 U.S. Law Week 4265, 4270-4271 (1978).)

Assuming, for argument's sake, that Vehicle Code §§3062 and 3063 direct the Board to take "anticompetitive" action, it is clear that the Act is a clearly articulated, affirmative expression of a state policy to substitute the decision of the five public members of the Board for the unilateral decision of an automobile manufacturer on the issue of whether a franchise can be placed in the relevant market area of an existing franchisee carrying the same line-make of automobile. The Act establishes a system of comprehensive regulation of certain automobile manufacturer-dealer relationships through a clear and direct choice of the California State Legislature. Thus the Act and the Board's activities relevant to this action constitute state action and cannot be held invalid due to any asserted "conflict" with the federal antitrust laws under the Supremacy Clause. As this Court has so often stated, such state action must be held valid regardless of any conflict with the federal antitrust laws because of the nature of our federal system of government and the corollary concept of state sovereignty (*Parker v. Brown*, 317 U.S. 338, 351, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-791, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 360, and *City of Lafayette, et al. v. Louisiana Power & Light Co.*, *supra*, 46 U.S. Law Week at 4271).

Heretofore, appellees have argued that the *Parker v. Brown* state action exemption does not apply to the Act and the Board's activities because in *Parker*, the state action involved was in furtherance of a state policy which was clearly consistent with and in furtherance of an announced federal agricultural policy. However the state action exemption is not based upon a determination of whether or not the state action involved is consistent with or in furtherance of an announced federal policy. Instead, as established above, the state action exemption rests firmly upon the principle of a federal system of government with the necessary auxiliary concept of complete state sovereignty so that the states can perform their proper function under the Reserved Powers Clause of the Tenth Amendment. It is clear, for instance, that the ban on attorney advertising which this Court held valid in *Bates* against a Supremacy Clause challenge was in no way in furtherance of, or consistent with, any federal policy of suppression of the right of advertising by attorneys or any other professional or business group. Absent a problem under the Commerce Clause when a state policy may produce an "undue burden on interstate commerce", a state, acting as a sovereign, is free to use state officials to accomplish an admittedly "anticompetitive" regulatory scheme. As mentioned before, due to the fact that appellees elected not to present any "undue burden" argument to the district court, there is no issue presently before this Court concerning the Act and the Board and their effect, if any, on interstate commerce.

Appellees' argument that sovereign state action must, regardless of effect on interstate commerce, be invalidated if it "conflicts" with the policy of the federal antitrust laws would, if accepted, destroy the ability of states to meaningfully govern commercial activity. Appellees would thus apparently have this Court reinstitute a concept of economic "substantive due process" which would involve the federal judiciary in an unending chore of invalidating public enactments of popularly elected state legislatures.

Appellees have heretofore argued that this Court's decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed.2d 1035 (1951) requires a determination that the Act is invalid under the Supremacy Clause. Such an assertion clearly misreads the teaching of the *Schwegmann* case, which was, and is, that a state, by passing a statute, cannot immunize *private* conduct from the application of the federal antitrust laws. *Schwegmann* involved *private* price fixing, with no "state action" involved, such as a regulatory system designed to eliminate or minimize any anticompetitive effect. The Act, on the other hand, establishes a procedure under which the Board, clearly composed of state officials, carry out a comprehensive regulatory system of control over manufacturer-dealer relations, including control, in certain instances, over the ability of a manufacturer to establish a new franchisee in a given location when the Board is convinced that there is good cause for not allowing such action. The crucial distinction between a situation in which state legisla-

tion merely attempts to immunize throughly private anticompetitive activity and a situation in which state legislation directs state officials to comprehensively regulate certain industrial conduct has recently been forcefully noted by this Court. (*Bates v. State Bar of Arizona, supra,* 433 U.S. at 359-363.)

Appellees have also heretofore argued, in their Motion to Dismiss, that the Act clearly conflicts with the federal Automobile Dealers' Day in Court Act (15 U.S.C. §§1221-1225) ("Dealers' Day Act") and should thus be held invalid. However, such an argument must specifically overlook section 5 of the Dealers' Day Act which states:

> "This chapter shall not invalidate any provision of the laws of any State except insofar as there is a *direct conflict* between an *expressed provision* of this chapter and an expressed provision of the State law which cannot be reconciled." (15 U.S.C. §1225) (*emphasis added*)

Obviously there is no "direct conflict" between the Dealers' Day Act, which establishes a private right of action for dealers who are injured by bad faith actions on the part of manufacturers, and the California Act, which, among other things, establishes Board review of a decision of a manufacturer to establish a new franchise in certain limited situations. Under the extremely specific test established in §1225, manifestly a clear expression of Congressional policy, the Dealers' Day Act does *not* preempt the California Act.

CONCLUSION

For the reasons specified above, appellants-intervenors submit that this Court should reverse the summary judgment granted by the district court below and remand this action to that court for further proceedings.

Respectfully submitted,

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May 1, 1978.

(Appendix Follows)

APPENDIX

Appendix

THE CONSTITUTION OF THE UNITED STATES

Article I:

§ 8. [1] The Congress shall have Power * * *

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes:

* * *

Article VI:

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Amendment XIV:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE SHERMAN ANTI-TRUST ACT
(15 United States Code §1)

§ 1. Every contract, combination in the form of trust or otherwise, where conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

CALIFORNIA VEHICLE CODE SECTIONS

* * *

§ 507. *Relevant Market Area*

The "relevant market area" is any area within a radius of 10 miles from the site of a potential new dealership.

* * *

§ 3060. *Termination of Franchise*

Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentations by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until reso-

lution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

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§ 3061. *Good Cause*

In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

§ 3062. *Establishing or Relocating Dealerships*

(a) In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area where the same line-make is then represented, the franchisor shall in writing first notify the board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

(b) With respect to the relocation of an existing dealership, subdivision (a) shall not apply to any relocation which is less than one mile from the existing location of the dealership and which is to a location within the same relevant market area within the same city where the existing dealership is located.

§ 3063. *Good Cause*

In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board should take into consideration the existing circumstances, including, but not limited to:

(1) Permanency of the investment.

(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

(3) Whether it is injurious to the public welfare for an additional franchise to be established.

(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

* * *

§ 3066. *Hearings on Protests*

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notifications by the board of protests and decisions of the board. The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(d) No member of the board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a protest filed pursuant to this article.

§ 3067. *Decision*

The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. If the board fails to act within 30 days after such hearing, within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail, as well as to all individuals and groups, which have requested notification by the board of protests and decisions by the board. The decision shall be final upon its delivery or mailing and no reconsideration or rehearing shall be permitted.

§ 3068. *Judicial Review*

Either party may seek judicial review of final decisions of the board. Time for filing for such review shall not be more than 45 days from the date on which the final order of the board is made public and is delivered to the parties personally or is sent them by registered mail.

§ 3069. *Application of Article*

The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches, distributors and distributor branches at the time of its enactment and to all such future franchises.

* * *

§ 11713.2.

It shall be unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code:

* * *

(l) To modify, replace, enter into, relocate, terminate or refuse to renew a franchise in violation of Article 4 (commencing with Section 3060) of Chapter 6 of Division 2.